No. 80-760

In the Supreme Court of the United States

OCTOBER TERM, 1980

DONALD A. TURNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that his retrial, following his successful motion for a new trial, is barred by the Double Jeopardy Clause of the Fifth Amendment.

1. Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiracy to possess with intent to distribute and to distribute cocaine, aiding and abetting another to possess cocaine with intent to distribute it, and use of a communication facility to facilitate possession with intent to distribute and distribution of cocaine, in violation of 21 U.S.C. 846, 841(a)(1) and 843(b). Petitioner filed a motion for judgment of acquittal and a motion for a new trial, contending, *inter alia*, that his conviction was tainted by government misconduct. Specifically, petitioner alleged that the government had suppressed information indicating that it had promised one of its witnesses at petitioner's trial leniency in exchange for his testimony.

In a lengthy opinion (Pet. App. 1b-37b), the district court concluded (Pet. App. 24b-25b) that this Court's decision in *Giglio* v. *United States*, 405 U.S. 150 (1972), required petitioner to make a two-part showing in support of his new trial request: (1) that there was, in fact, an undisclosed government promise to a key witness; and (2) that there was a reasonable likelihood that the false testimony denying the existence of such a promise could have affected the jury's judgment. With respect to the first prong of the test, the court found (Pet. App. 26b-28b) that a DEA agent who testified for the government at petitioner's trial intentionally and falsely stated that he had made no promises of leniency to another government witness. For purposes of considering petitioner's new trial request, the court imputed the agent's misconduct to the prosecution (Pet. App. 19b-20b). The court stated (Pet. App. 37b), however, that if it were necessary to decide the question, it "would be compelled to find that [the prosecutor] was free of any knowledge of [the agent's] activity."

As to the second prong of the *Giglio* test—the impact of the false testimony upon the jury—the court concluded that the jury's judgment as to petitioner's guilt could not have been affected by the agent's false testimony (Pet. App. 25b). Moreover, the district court found that disclosure of the agent's promise to the witness would not even have affected the jury's assessment of the witness's credibility (Pet. App. 30b). Nonetheless, the court granted petitioner's new trial request "in the interests of justice" (Pet. App. 34b-37b).

Following this favorable response to his new trial motion, petitioner filed a motion to dismiss his indictment, arguing that retrial was barred on double jeopardy grounds. While that motion was pending, the government petitioned the

court of appeals for a writ of mandamus, seeking reversal of the district court's new trial order. The petition was denied. The district court then rejected petitioner's motion to dismiss the indictment. The court of appeals affirmed, Judge Keith dissenting (Pet. App. 1a-3a).

2. We submit at the outset that the district court clearly erred in granting petitioner's motion for a new trial in the face of its express finding (Pet. App. 25b, 30b) that the agent's assertedly false testimony had no effect on the jury's judgment. Thus, were it not for the fact that the granting of a motion for a new trial is not appealable, that decision presumably would have been overturned, and there would have been no need to retry petitioner.

In any event, petitioner's double jeopardy claim is frivolous in the context of this case. It amounts to an assertion that any misconduct by a prosecutor, regardless of its motivation or its prejudicial consequences for the defense, bars a retrial of the defendant. Even when a conviction is properly set aside, however, there is no bar to retrial as long as the reversal is not based on any evidentiary insufficiency. *Burks* v. *United States*, 437 U.S. 1 (1978); see *United States* v. *Dinitz*, 424 U.S. 600, 610 & n.13 (1976); *United States* v. *Tateo*, 377 U.S. 463, 465 (1964); *United States* v. *Ball*, 163 U.S. 662, 671-672 (1896). Indeed, in *Burks* v. *United States, supra*, 437 U.S. at 15, the Court specifically stated that retrial is permitted following a reversal for trial error, "*e.g.*, incorrect receipt or rejection of evidence, incorrect instructions, *or prosecutorial misconduct*" (emphasis added).

While the Court has suggested that there may be situations in which prosecutorial misconduct is so egregious as to bar a retrial following the granting of a defendant's motion for a mistrial (*United States* v. *Dinitz, supra*, 424 U.S. at 601; *United States* v. *Jorn*, 400 U.S. 470, 485 (1971);

United States v. *Tateo, supra*, 377 U.S. at 468 n.3), this case plainly does not present such a situation. This Court has made clear on several occasions that the type of misconduct that will bar retrial following the granting of a defendant's motion for a mistrial involves prosecutorial action *intended to provoke* the mistrial request and thereby subject the defendant to multiple prosecutions. *United States* v. *DiFrancesco*, No. 79-567 (Dec. 9, 1980), slip op. 13; *United States* v. *Dinitz, supra*, 424 U.S. at 611; *United States* v. *Jorn, supra*, 400 U.S. at 485 n.12; *United States* v. *Tateo, supra*, 377 U.S. at 468 n.3.[1] In the present case, however, the prosecutor was not even aware that the agent had testified falsely concerning his promise of leniency to the government witness (assuming arguendo that the agent's testimony was in fact false) (Pet. App. 37b). Indeed, at trial the prosecutor directly questioned the witness about his favorable relationship with the government (see Pet. App. 20b-21b). In light of that fact, it cannot seriously be contended that the nondisclosure of the specifics of the agent's promise was an intentional tactic designed to require a retrial of the case or even that it was conduct otherwise "designed to avoid an acquittal." *United States* v. *Jorn, supra*, 400 U.S. at 485 n.12.

Moreover, in its new trial order, the district court specifically found (Pet. App. 25b, 30b) that the government's misconduct in failing fully to disclose to the jury the agent's promise to the witness had not prejudiced petitioner in any way. Indeed, the district court hardly could have found

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[1]Although, as we show below, the facts of the present case do not warrant it, it is possible that, in an appropriate case, the same argument might be made against retrial after a conviction has been set aside at the conclusion of trial.

otherwise, given that the jury already knew (1) that the witness had agreed to cooperate with the government all along, (2) that, at the time of petitioner's trial, the witness still expected that the government might make a favorable recommendation to the sentencing judge in his own case if he continued to cooperate, and (3) that the government, through the Florida United States Attorney's Office, in fact recommended probation when the witness pleaded guilty (Pet. App. 21b). In each of the cases relied on by petitioner (Pet. 9) in support of an expansive construction of the Double Jeopardy Clause following a mistrial order, however, the governmental misconduct that was held to bar retrial was found to have "seriously prejudiced" the defendant. See *United States* v. *Martin*, 561 F. 2d 135, 139-140 (8th Cir. 1977); *United States* v. *Kessler*, 530 F. 2d 1246, 1257 (5th Cir. 1976).[2] While we disagree with the holdings of those cases, they afford petitioner no aid. Here, where petitioner was specifically found not to have been prejudiced by the governmental action that was the basis for his successful new trial motion, he should not be provided with a windfall prohibiting his retrial.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1981

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[2]In *United States* v. *Alford*, 516 F. 2d 941 (5th Cir. 1975), also relied on by petitioner (Pet. 9), the district court found that no defense request for a mistrial had been made and therefore applied the "manifest necessity" standard.